In the Matter of:	)	
LONNIE J. PORTER, Claimant,	)	Date Issued: November 27, 1998
against	)	Case No. 1998-LHC-283
DIX SHIPPING COMPANY, Employer	)	OWCP No. 08-91717
and	)	
SIGNAL MUTUAL INDEMNITY, ASSOCIATION, LTD., Carrier	)	

APPEARANCES:

PHIL WATKINS, ESQ.
600 Leopard Street, Suite 805
Corpus Christi, Texas 78473
On behalf of the Claimant

CHARLES F. HERD, JR., ESQ
1331 Lamar, Suite 1560
Houston, Texas 77010-3028
On behalf of the Employer

Before: LARRY W. PRICE
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (herein the Act), 33 U.S.C. § 901, et seq., brought by Lonnie J. Porter (Claimant) against Dix Shipping Company (Employer) and Signal Mutual Indemnity Association, LTD (Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, a Notice of Hearing was issued scheduling a formal hearing on July 23, 1998 in Houston, Texas. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant testified and offered 14 exhibits which were admitted into evidence (marked CX-1 - CX-14). The employer presented two witnesses and offered 19 exhibits which were admitted into evidence (marked EX-1 - EX-19). One joint exhibit was admitted into evidence

(marked JE-1).[1] Both parties were given the opportunity to enter post-hearing briefs and exhibits that were deemed necessary to complete the record. These exhibits were admitted into evidence (marked CX-15-CX-16 and EX-20).

Based upon the stipulations of the parties, the evidence introduced, and the arguments presented, I find as follows:

I. STIPULATIONS

During the course of the hearing the parties stipulated and I find as related to Case No. 98-LHC-283 (JE-1):

1. Jurisdiction is not a contested issue. At the time of the alleged injuries, Claimant was covered under the Act since he was engaged in the unloading of cargo from a vessel upon the navigable waters of the port of Corpus Christi, Texas, for Employer, Dix Shipping Company.

2. Date of injury/accident: March 18, 1988.

3. Injury occurred within the course and scope of the employment.

4. Employer/Employee relationship existed at the time of the accident.

5. Date the Employer was advised of the injury: March 18, 1988.

6. Notification was timely under Section 12 and Section 13 of the Act.

7. The Notice of Controversion (LS-207) was filed on September 14, 1988.

8. There was no Informal Conference.

9. Average weekly wage at the time of the injury: $364.39 with a compensation rate of $242.90.

10. Nature and extent of disability:
    a) Temporary Total Disability from March 18, 1988 to December 1, 1993.
    b) Benefits paid: $136,345.44;
    c) Medical benefits paid: Yes.

11. The date of maximum medical improvement: December 1, 1993.[2]

II. ISSUES

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[1] References to the transcript and exhibits are as follows: Trial Transcript - Tr.____; Claimant Exhibits - CX ____, p.____; Employer Exhibits - EX_____, p.____; Joint Exhibits - JE____.

[2] As discussed later in this opinion, I find March 7, 1989, the date of MMI for the scheduled knee injury.

1. Nature and extent of disability (temporary v. permanent partial v. permanent total).

2. Claimant's entitlement to interest on compensation not paid within 14 days of the date due.

3. Claimant's attorney's right to an attorney fee in addition to compensation under Section 28.

4. Alternative employment and loss of wage earning capacity.

5. Scheduled injury vs. General injury.

6. Causation/pre-existing injury/ subsequent injuries.

7. Overpayment/credit on prior compensation.

III. STATEMENT OF THE CASE

Summary

Claimant was injured on March 18, 1988, when he was struck by several heavy pipes that fell into the hold of a ship. He was treated by several doctors with his early medical treatment directed mainly towards his right knee, lumbar spine and cervical spine. Claimant was assigned a 30% impairment rating for the right knee injury. By 1992, Dr. Echeverry had become Claimant's treating physician and the focus of Claimant's treatment was his cervical spine. In 1992, Dr. Echeverry performed an anterior cervical fusion of the C5/6 and C6/7 vertebrae. Because of complications a second operation was performed in 1993.

In 1995, Claimant suffered an injury to the C4/5 vertebrae when he jumped to cheer at a basketball game. Dr. Echeverry believes the problems at C4/C5 are related to the earlier fusion of C5/7. Dr. Barrish, who examined Claimant at the request of Employer, feels the C4/5 injury is not an aggravation of the C5/7 injury but is a separate unrelated injury. Claimant has refused to undergo further surgery although it has been recommended by both doctors. Both doctors agree Claimant reached MMI on December 1, 1993.

Claimant has not worked since the 1988 accident. The Parties presented evidence concerning available employment and whether Claimant was capable of performing various tasks required by those positions.

Claimant's Testimony

Claimant testified and his deposition is Employer's Exhibit 14. Claimant is a 44 year old longshoreman with a high school degree. At the time of his injury he was in good health working as a foreman in charge of a union hall work gang. Prior to that he had served as a general laborer, crane driver, forklift operator, and tow-motor operator. (Tr. 39-43).

Claimant began working for the Union in 1972 as a general laborer. (Tr. 39). Between then and March 18, 1988, he suffered several on-the-job injuries. In 1977, Claimant was struck by several bails of cotton resulting in a short period of time off with no surgery. (Tr. 60-61). In 1981 he underwent both a toe fusion and a left hand fusion resulting in a permanent partial disability rating of 15% for the hand and 10% for the foot. (Tr. 58, 126). In either 1986 or 1987 a forklift fell on his left foot and fractured it; however, no surgery was required for its recovery. (Tr. 61).

On cross-examination there appeared to be some question as to whether there had been a right knee injury in 1987. Claimant claims there is no way there could have been as he was in the process of coming back from the toe and wrist surgery. Employer's counsel points out there is a report from Dr. Wilks stating there was a strain to the medial collateral ligament and possibly a tear. (Tr. 124-125).

On March 18, 1988, Claimant was injured when he was struck by heavy-gauge drilling pipes that had fallen 20 to 25 feet when the cables of the take-out crane slipped. (Tr. 70-72). The accident occurred in the hold of a vessel the Claimant was unloading for the Dix Shipping Company. (Tr. 68). The claimant was injured by pipes falling on his right leg and on the left shoulder and neck when he was thrown into the wall. (Tr. 74, 76-78).

Following the accident, Claimant underwent fasciotomy surgery on his broken leg. (Tr. 78). This was followed by reconstructive surgery of the muscles and nerves combined with a skin graft. (Tr. 79). In 1990 Claimant had two knee surgeries followed by a fusion of the C5-6 and C6-7 vertebrae in 1991. (Tr. 80-81). The last surgery Claimant underwent was a refusion of the C6-7 vertebrae. (Tr. 85).

The Claimant suffered an additional alleged injury in 1994 or 1995 while at his son's basketball game. He was standing up to cheer when he experienced a sharp pain radiating from his neck to his hands. (Tr. 90-91). The Claimant's current treating physician, Dr. Echeverry, feels there is a need for an additional surgery to fuse the C4-5 vertebrae. (Tr. 83). The findings of Dr. Echeverry are backed up by similar findings by Employer's physician Dr. Barrash. (Tr. 97). The Claimant is currently undecided as to whether or not to have the additional neck surgery. (Tr. 84-85). It has been roughly three years since Dr. Echeverry first recommended the surgery and Claimant still has not decided whether or not to have the surgery. (Tr.132).

In addition to the neck surgery, Dr. Echeverry and Dr. Gutzman feel the Claimant is in need of lumbar surgery. Again the claimant is unclear as to whether or not he wishes to have the surgery. (Tr. 87).

At no one point since March 18, 1988, has any doctor released Claimant to return to work. Dr. Echeverry did state that Claimant reached maximum medical improvement in December of 1993. He has not voluntarily returned to work because he continues to suffer pain. Following the surgery to the neck, Dr. Echeverry filed an OWCP-5 stating there was no limitation in Claimant's ability to stand, bend, twist, or reach as a result of the surgery. (Tr. 136-137). The lack of limitations was specifically limited to the neck and did not include other body parts. (EX.11, p. 65).

The Claimant testified to the effect that he is unable in his current condition to perform any of the jobs he previously performed on the waterfront. The reason being the lack of mobility in his neck combined with a general inability to bend over and pick items up. (Tr. 93-96). Claimant feels he is unable to perform a desk job for a period of 8 hours without experiencing significant back pain for which he takes prescription medication. (Tr. 100). He also feels he is unable to drive a vehicle for employment; however, he does drive his children to school every day. (Tr. 101-102).

Claimant testified that he is physically incapable of maintaining employment as a security guard, telemarketer, photo lab worker, car cleaner, hotel custodial worker, light assembly worker, or distributer of potato chips. This being due to a combination of physical problems involving his right knee, neck, lower back, and the need to lie down and rest on a regular basis. (Tr. 103-105). On cross-examination Claimant testified he still performed all the needed maintenance on the family cars. (Tr. 108). He also appears to have reasonable freedom of movement and hand-eye coordination based on gestures during testimony and his testimony that he can pick up a pin on a table. (Tr. 118).

Claimant testified that he would have enough seniority to perform the more desirable and higher paying jobs if he returned to the union. (Tr. 112). The attorney for the Employer suggested that due to changes in the types of cranes used currently as opposed to ten years ago the Claimant might be able to operate them with his physical restrictions. Claimant felt this was not the case. (Tr. 115-116, 139-150). Claimant testified that he can do physical activities once in a while but not all day. (Tr. 154).

I had the opportunity to observe Claimant during the day long hearing. During his testimony I found the Claimant to be very alert and articulate.

Medical Record Evidence

All the medical bills have been paid and there is no dispute Claimant suffered a broken leg and bruised shoulder as a result of the accident on March 18, 1988.

Following the initial accident, Claimant went to Memorial Medical Center where he was treated by Dr. Rivera and Dr. Perez. On March 23, 1988, they performed fasciotomies on Claimant's right leg to relieve swelling that was the result of a blunt trauma to the leg. This was followed by a skin graft to the incisions on the leg. (EX.11, p. 15)

On November 25, 1988, Dr. Bahamon begins treating Claimant following a referral from Dr. Perez. This is in response to a MRI on October 6, 1988, that showed herniated discs at C5/6 and C6/7. Claimant's neurological examination was normal with no evidence of spinal cord compression. It was suggested that a EMG be performed with the possibility of a myelogram follow up. (EX.11, p. 16-18).

Dr. Martin examined Claimant on December 19, 1988, to obtain a second opinion for Signal Mutual Insurance. Dr. Martin found Claimant had a slight narrowing of C5/6 interspace and a MRI showed disc protrusions at C5-6 and C6-7. Therefore he recommended an EMG as previously suggested by Dr. Bahamon. Claimant failed to appear for the EMG and Dr. Martin rescheduled the EMG following Claimant's January 25, 1989 appointment. It was the opinion of Dr. Martin that Claimant was suffering mainly from a lumbar strain. (EX.11, pp. 23-25).

On February 8, 1989, the electromyographic examination(EMG) was performed by Dr. Bahamon. The EMG was completely normal and demonstrated no radiculopathy from C5 to T1. No sign of atrophy or change in reflexes signifying spinal compression was found. Dr. Bahamon suggested a course of strictly conservative treatment combined with physical therapy. (EX.11, p. 27).

On March 3, 1989, Dr. Perez performed an arthroscopy and excision of plica on Claimant's right knee. Feeling Claimant had reached maximum medical improvement, Dr. Perez referred Claimant to Dr. Puente on March 7, 1989. (EX.11, p.29).

On June 23, 1989, Claimant was seen by Dr. Seger on behalf of Abercombie, Simmons & Giplin. Dr. Seger found Claimant had tenderness and slight reduction of movement in the lumbar spine region. Straight leg raises and Lasegue's test were negative and Claimant was found to be neurologically intact. Five x-rays were taken of the lumbar region. They showed no significant fractures, dislocations or joint space narrowing. No spondylosis or spondylilisthesis was seen. Dr. Seger's impression was a chronic lumbar strain and chronic cervical strain combined with status post fibular fracture with compartment syndrome of the knee. As a result Dr. Seger decided Claimant had a 5% permanent partial impairment of his lumbar spine which should not limit Claimant from working. Dr. Seger also found a 30% permanent partial impairment of Claimant's right knee. (EX.11, pp. 31-32).

On August 9, 1989, Dr. Martin recommended to Signal Mutual Insurance that Claimant be admitted to Spohn Hospital for a myelography. This was scheduled; however, Claimant canceled the appointment. (EX.11, p. 34).

Dr. Seger's report to Abercrombie, Simmons & Gilpin, on May 1, 1990, stated Claimant had undergone a myelogram and CAT scan. These tests demonstrated evidence of a herniated nucleus pulposus at C5/6 and C6/7. In addition to the earlier disabilities, Dr. Seger felt Claimant would also suffer from a 10% permanent partial impairment to his cervical spine whether he eventually had surgery or not. (EX.11, p. 35).

Dr. Martin examined Claimant again on May 8, 1990. The myelogram performed on March 27, 1990 showed no problems with the lumbar spine area but did show herniation of the discs at C5/6 and C6/7. He suggested surgery might be needed; however, he noted he had been unable to verify the herniations with clinical evidence. Dr. Martin filed a OWCP-5 following the examination. He felt Claimant could continuously sit or walk for 8 hours. Bending, squatting, kneeling, twisting, and standing were permitted for intermittent 8 hour periods. Climbing was not permitted. Lifting was limited to 10-20 pounds with no reaching above the head and shoulders. Claimant was given no restrictions on foot controls but was not permitted to operate a vehicle. Dr. Martin was unsure whether Claimant could perform an eight hour day and did not feel maximum medical improvement had been reached. (EX.11, pp. 36-37).

On July 10, 1990, Dr. Perez suggested Claimant be examined by either Dr. Edwards or Dr. Meadows in San Antonio in order to resolve the difference of opinion between himself and Dr. Seger. (EX.11, p. 39). On July 23, 1990, Dr. Edwards examined Claimant finding surgery was probably not needed on C5/6. Dr. Edwards also wished to get a MRI of the lumbar area. The MRI

showed there was a mild protrusion of the L4-5 and L5-S1 interspace material with spur formation which was compounded by spinal stenosis. Due to this Dr. Edwards felt lumbar surgery might not be out of the question in the future. (EX.11, pp. 41-44).

At some point prior to November of 1992 Claimant was seen by Dr. Parker who tried to admit him to Memorial Medical Center for cervical and lumbar myelograms as well as a CT scan. (EX.11, pp. 45-46).

During this period, Dr. Echeverry became Claimant's treating physician. Dr. Echeverry performed an anterior cervical diskectomy of Claimant's C5 to C6 and C6 to C7 vertebrae on November 10, 1992. This was followed by an anterior cervical fusion of the same areas. (EX.11, p. 47). The surgeries proceeded properly; however, on March 18, 1993, Dr. Echeverry felt the bone plug at C6/7 was not healing correctly and a second operation was needed. This was confirmed by Dr. Chepey's March 9, 1993 x-rays and testing. (EX.11, pp. 52-53). On April 14, 1993, Dr. Echeverry performed a revision anterior cervical fusion to correct the problem. (EX.11, pp .55-56).

Maximum medical improvement, according to Dr. Echeverry, was reached on December 1, 1993. (EX.11, p. 58).

On April 6, 1994, Claimant was seen by Charlie C. Costa, L.P.T. at the Work Rehab Centers of Texas. He was to evaluate Claimant's need for physical therapy. Claimant reported he had been receiving physical therapy for his neck, back and knee which had produced positive results. Mr. Costa noted no limitation in Claimant's knee movement; however, there was a slight reduction in back mobility. The treatment plan designed for Claimant included sessions with a physical therapist three times a week followed by HMP with I.F.C. to the lower back and cold packs with I.F.C. to Claimant's right knee. (EX.11, pp. 59-61).

On April 15, 1994, Dr. Newth performed an MRI of Claimant's lumbar spine and right knee. The MRIs indicated there was some fluid build-up in the knee and degenerative disc bulging at L4-5 and L5-S1. (EX.11, pp. 62-63).

On September 1, 1994, Claimant was contacted by Silas M. Crutchfield, OWCP Vocational Rehabilitation Specialist District 8. His letter included Dr. Echeverry's OWCP-5 and a letter of referral to Donna Johnson to provide counseling, guidance, testing and placement services. (EX.11, pp. 64-67).

On April 5, 1995, Dr. Echeverry saw Claimant concerning the pain Claimant experienced at his son's basketball game. Dr. Echeverry felt x-rays should be obtained to check the healing of the neck fusions. (EX.11, p. 68).

On May 20, 1995, Claimant was seen by Dr. Perez who concluded Claimant could not return to a full-time employment. He felt Claimant needed two weeks rehabilitation to build strength in his lower left extremity and back. Even with the rehabilitation, Dr. Perez felt Claimant's lower back would not allow him to return to work unless as an operator of a hydraulic machine.(EX.11, pp. 69-70).

On June 12, 1995, Dr. Echeverry followed up the April appointment by ordering an EMG, nerve conduction velocities and an MRI of Claimant's cervical spine. (EX.11, p. 71). On July 5, 1995, Dr. Echeverry told Claimant the MRI showed postop changes of the fusions at C5-6 and C6-7. This was combined with both severe neural canal stenosis and a midline and left side cervical disc herniation at C4-5. The herniation resulted in pressure being placed on the neural canal and the neural foramina and cervical spinal cord. At that time the EMG had not been performed; however, Dr. Echeverry felt this problem at C4-5 needed to be addressed further. He ordered a myelogram of Claimant's cervical spine. (EX.11, p. 72).

Dr. Echeverry performed the cervical myelogram and CT scan on August 11, 1995. The test showed the following:

> 1. Very large 4-5 anterior extra dural defect with calcifications centrally and to the left side. Indeterminate between a partially calcified disc and very large cartilaginous cap over spurring though the latter was unlikely.
> 2. 5-6 diffuse spurring compressing the spinal canal, mainly on the left and compressing the cord almost as severely as the 4-5 process noted.
> 3. 6-7 moderate spurring also flattening the cord but much less severe.

On August 23, 1995, Dr. Echeverry discussed these findings with Claimant and recommended surgery to correct the problems. (EX.11, pp. 73-75).

On November 4, 1995, Claimant informed Dr. Perez of numbness in his right hand and fingers which made buttoning a shirt difficult. Claimant further reported intense numbing pain in his right thumb. This marked the first time Dr. Perez had heard of the problems at the basketball game. (EX.11, p. 77).

On January 9, 1996, Dr. Bonikowski performed a nerve conduction test on Claimant finding no evidence of carpel tunnel syndrome. (EX.11, pp. 79-80, 82).

Dr. Barrash submitted his first report summarizing the medical records of Claimant on March 23, 1998. (EX.11, pp. 83-84).

Dr. Gutzman examined Claimant on June 1, 1998. He found Claimant had a 25% restriction of movement in his cervical spine and tenderness in the mid-line paraspinal musculature of the lumbar spine. The knee reflexes were decreased on the left and the right leg had scars consistent with a compartment syndrome release. The right knee had patella femoral crepitation with pain along the edial facet of the patella. A review of Claimant's x-rays showed spinal stenosis with herniated disc at L4-5 and annular bulging at L5-S1. The cervical spine was fused from C5-7 with a herniated disc at C4-5. (EX.11, pp. 87-88).

Dr. Barrash examined Claimant on June 9, 1998, and found that Claimant's cervical problems were related to the accident of 1988. Dr. Barrash felt Claimant was in need of having the pressure taken off C4-5 and had stenosis of C5-6 and C6-7. The problems at C4-5 were not found to be causally related to the March 18, 1988 injury according to Dr. Barrash. (EX.11, p. 90) In his June 30, 1998 report, Dr. Barrash explained the spinal stenosis at C5-6 and C6-7 were

osteoarthritis and not the result of the 1988 accident. Dr. Barrash also place Claimant at maximum medical improvement as of December 1, 1993, unless future surgery was performed. (EX.11, p. 91).

On July 8, 1998, Dr. Gutzman issued his OWCP-5. (CX.1, DepX.3, p.1).

Dr. Barrash's Testimony

Dr. Barrash is a neurosurgeon from Houston, Texas, who has been practicing since 1972.(Tr. 164-166) Originally he was selected by the U.S. Department of Labor to perform an independent medical examination on Claimant. His appointment was objected to by Claimant and Employer hired him to perform an examination of Claimant. (Tr.167-168). Dr. Barrash has performed as an independent medical examiner 15-20 times. (Tr. 172).

Dr. Barrash noted Claimant's right leg appeared to function normally; however, he did not perform any further tests on the leg. Based on his observation Dr. Barrash did not feel there was any significant restrictions that would prohibit Claimant's ability to work. (Tr. 171).

There is no dispute that Claimant reached maximum medical improvement as to his neck surgery in December of 1993. (Tr. 171).

Dr. Barrash agrees with Dr. Echeverry that there is a need for future surgery on Claimant's neck. They do not agree as to the causation of the injury. Dr. Barrash feels the C4/5 problem is a separate injury, not an aggravation of the prior injury and surgery to the C5-7 area. (Tr. 183). Dr. Echeverry feels the limitation of the neck's normal range of motion forced the C4/5 disc to overcompensate for the lack of movement in the C5-7 area and thus is an aggravation.(Tr. 207). Without the surgery Dr. Barrash feels Claimant is facing some restrictions on his ability to work. He feels a semi-sedentary employment includes office work and being a security guard as long as the lifting is less than 20 pounds. (Tr. 189-191). He also feels kneeling should be kept to less than 12 times a day and no climbing of ladders because of the pressure it puts on the neck. (Tr. 194). Dr. Barrash testified Claimant indicated he has no intention or desire of ever returning to the work force. (Tr. 204).

Dr. Barrash strongly disagrees with the report by Dr. Gutzman. He feels there is no reason for Dr. Gutzman's opinion that Claimant has a complete inability to perform any type of work. (Tr. 210-211, 230). Dr. Barrash would prohibit Claimant from jobs which require him to tilt his head and neck backwards to a significant degree. This would include jobs operating a forklift, climbing up a ladder to a crane, or working as a car cleaner. (Tr. 233, 236-237). He also feels sitting for eight hours or lifting more than 25 pounds is not a good idea. (Tr. 233-237).

Deposition of Dr. Echeverry

Dr. Echeverry was Claimant's treating neurosurgeon following a referral from Dr. Perez. (CX.1, p. 7). He has been treating patients for 22 years as a neurosurgeon. (CX.1, p. 9). Initially, Claimant was being treated by Dr. Eugenio; however, Claimant was referred to Dr. Echeverry when Dr. Eugerio went to Desert Storm. At that point Claimant was complaining about pain in his neck, left upper extremity, lower extremities, and lower back. This pain was the result of injuries that Claimant had suffered during his 1988 accident. (CX.1, p. 11).

Dr. Echeverry's diagnosis was that Claimant had two damaged discs in his cervical spine. As a result he recommended a two-level cervical diskectomy and for fusion to be performed. The original surgery led to complications and a second surgery was performed. (CX.1, pp. 12-13).

Currently, Claimant is suffering radicular pain in his arm and numbness in his hand as a result of an injury to the disc between C4 and C5. This was apparent to Dr. Echeverry in clinical studies performed in August of 1995. As a result Dr. Echeverry has repeatedly talked to Claimant about having surgery to correct the problem. To date Claimant has refused to have the surgery. (CX.1, p. 14).

Based upon Claimant's current medical problems Dr. Echeverry is of the opinion that Claimant can not return to his previous employment or any employment consisting of an eight hour work day. (CX.1, p.15). Dr. Echeverry further believes Claimant can not perform any employment requiring him to reach above his head and shoulder level, to use foot and pedal controls, or to bend and kneel. (CX.1, p.18).

Dr. Echeverry's medical opinion of the injuries to Claimant's lower back are based on his knowledge as a twenty-seven year expert in lower back surgery. He has studied the report of Dr. Gutzman and the MRI scan performed on Claimant's spine. (CX.1, pp. 17-19).

The Claimant's medical condition would place certain restrictions on his future employment. The restrictions include no jobs requiring extended sitting for eight hours though sedentary work of a shorter duration is possible. The same is true of walking, however, Dr. Echeverry would not commit to a set number of hours. He prefers to have clients try incrementally greater periods until they can determine what they can handle for themselves. Claimant should not perform any job requiring him to lift more than ten pounds. Jobs requiring kneeling, bending, and climbing are similarly beyond Claimant's abilities. Jobs requiring twisting of the body or neck would be very painful and Dr. Echeverry recommends they be avoided. (CX.1, pp. 21-23).

Dr. Echeverry set Claimant's maximum medical improvement at December 13, 1993. He feels any future operation would be mainly for the purpose of pain reduction. The operation to fuse C4/5 would not be likely to increase Claimant's ability to return to work. (CX.1, pp. 24-25).

In opposition to Dr. Barrash, Dr. Echeverry believes the current problems at C4/5 are related to the earlier fusion of C5-7. He feels it is medically reasonable to assume the need for C4/5 to compensate for the lack of movement in the fused section has caused the current problem. If surgery is not performed, it could further impair Claimant's ability to return to the work force. (CX.1, pp. 25-27).

Dr. Gutzman's reports and OWCP-5 forms were studied by Dr. Echeverry prior to the deposition and he was in agreement with the restrictions presented in those documents. (CX.1, p. 30).

Claimant's complaints of lower back pain were in existence when Dr. Echeverry started treating Claimant in September of 1992. It was evident from Claimant's statements and x-rays that there was a problem with his lower back; however, Dr. Echeverry was more concerned with

treating the spinal injuries at the neck level. (CX.1, pp .36-38). To alleviate the discomfort Claimant was suffering, Dr. Echeverry fused the C5/6 and C6/7 intervetebral spaces since the respective discs were herniated to the left. (CX.1, pp. 49-50).

Dr. Echeverry was not aware at the time he treated Claimant that Drs. Seger and Martin had also treated Claimant. (CX.1, pp. 51-52). He did tell Claimant there was a problem with his lower spine but currently has not treated the lumbar region. (CX.1, p. 52).

During a review of the OWCP-5 Dr. Echeverry filed September 8, 1994 it was established that there were no restrictions in the portions he had crossed out. Dr. Echeverry refused to state a set number of hours or days the patient could work. He felt he was unable to predict a set amount of hours and would rather patients determine the amount through trial and error. The date of maximum medical improvement was not changed by the OWCP-5, Dr. Echeverry signed on the wrong line. (CX.1, pp. 64-66).

Dr. Echeverry found Claimant was complaining of numbness on the dorsal aspect of his hands following the basketball game. He found this to be an unusual symptom and had trouble explaining it following the April 5, 1995 examination. Dr. Echeverry did not believe jumping up and down would result in compression or pressure being placed on the cervical spine. A study of the x-rays showed no problems prior to June of 1995. The sensation could have been caused by a herniated disc at the C4/5 level. (CX.1, pp. 69-71).

The combination of the fusion of C5/6 and C6/7 and the injury to C4/5 would cause Dr. Echeverry to change Claimant's restrictions. If no surgery is performed on C4/5 then Dr. Echeverry would be uncomfortable allowing Claimant to perform any physical activities. This does not include sedentary employments as they are less likely to present a risk of damage to the spinal cord which is under pressure at C4/5. This means no manual labor or exposure to trauma. For this reason Dr. Echeverry felt that a security guard position is out of the question due to the possibility of injury during a confrontation. However, if the work were limited to essentially standing or sitting only while watching monitors this would be considered sedentary and thus acceptable. He could also lift items up to ten pounds. Claimant would be at risk reaching above his shoulder level; however, bending, kneeling, driving, sitting for short periods, and walking would not present a risk to Claimant's neck. (CX.1, pp. 85-89).

Climbing steps and ladders would not present a major risk to the neck so long as they were done in a safe manner. Dr. Echeverry felt that an office type job would be acceptable as it does not require large neck movements. (CX.1, pp. 89-90).

When considering the lower back and neck injuries together Dr. Echeverry would further restrict Claimant from activities requiring the use of his lower back, lower extremities, bending, climbing and kneeling. Both of the spinal injuries are in need of treatment; however, Claimant has not decided to undergo surgery at this time. (CX.1, pp. 96-98).

Testimony and Vocational Report of Nancy Favaloro

Ms. Favaloro is a vocational rehabilitation counselor who has been practicing in New Orleans for the last 17 years. Ms. Favaloro is certified to work for the U.S. Department of Labor though she is no longer active on their lists.(Tr. 254-257). She was expanding upon a previous

U.S. Department of Labor vocational rehabilitation study performed by Ms. Donna Johnson. That study was abandoned due to Claimant not showing up for the evaluation and a continual difficulty in obtaining medical records. (Tr. 264).

Ms. Favaloro interviewed Claimant and administered several tests constituting the Woodcook-Johnson Revised Tests of Achievement. (Tr. 270). The entire process took roughly one hour and forty-five minutes. (Tr. 259). During that time she did not take any special note of Claimant's ability, or inability, to be seated for extended periods of time. (Tr. 259-260). She did notice Claimant was very articulate and presented himself well. (Tr. 260). Claimant informed her that he had been employed as a foreman, tow-motor operator, forklift operator, and winch operator; however, Claimant said he had not operated a crane. He did express a desire to do that in the future. It was not until his testimony at the hearing that she learned he had actually operated a crane. (Tr. 263).

The results of the Woodcook-Johnson test and a review of Claimant's employment file suggested Claimant would be well-suited for an entry level job. According to Ms. Favaloro he possesses an average aptitude in tasks dealing with general intelligence. He knows how to follow instructions; has demonstrated an ability to handle responsibility; can operate machinery; and can perform work to specifications. (Tr. 274; EX 16, p. 4) The restrictions caused by his physical injuries and surgery have limited him to sedentary or light duty employment.(Tr. 276).

In Ms. Favaloro's July 15,1998 report the Labor Market Survey identified five entry- level jobs available in the Corpus Christi, Texas area. All five jobs were available and constituted sedentary or light duty employment. (EX.16, p. 3). The jobs included:

1) A dispatcher for Safeguard Systems, an alarm monitoring company, paying $5.50 per hour. The employer had both full and part-time positions.(Tr. 276-278; EX.16, p. 5; EX.20, p. 3).

2) A delivery driver/dental lab technician trainee for Toothworks dental lab paying $5.15 to $6.00 per hour for part-time work. (Tr. 270-281; EX.16, p. 5; EX.20, p. 3).

3) A telemarketer for the Corpus Christi Times newspaper paying $6.50 per hour plus commission and bonus opportunities. Day or night shift part-time positions were available. (Tr. 281-282; EX.16, pp. 5-6; EX.20, p. 4).

4) An unarmed guard for a Guardco Systems Inc., a security company, paying $5.50 per hour. The company had both full and part-time positions available. (Tr. 282-283; EX.16, p. 6; EX.20, p. 4).

5) A photo lab worker at Wal Mart Supercenter One Hour Photo paying $5.50 per hour. Full and part-time employment positions existed. (Tr. 283-284; EX.16, p. 6; EX.20, p. 4).

Ms. Favaloro's report continued by identifying jobs available both in 1994 and July of 1998. These are all full time positions fitting Claimant's physical restrictions. (Tr. 286). They include:

1) A vehicle service attendant for a car rental company at Corpus Christi International Airport. The salary in 1994 was $4.25 per hour while in 1998 it was $5.15 to $6.00 per hour. (Tr. 285-286; EX.16, pp .6-7).

2) A house cleaning position at a hotel paying $4.25 per hour in 1994. In 1998 the position paid $5.15 per hour with the possibility of a raise after 90 days. (Tr. 286; EX.16, p..7).

3) An assembly worker position was available through an employment agency. The pay in 1994 was at least $4.50 per hour while in 1998 it was $5.50 to $6.50 per hour. (Tr. 286-287; EX.16, p. 7).

4) A custodial position available through employment agency. The pay in 1994 was at least $4.50 per hour, while in 1998 it was $5.50 to $6.50 per hour. (Tr. 287-288; EX.16, pp. 7-8).

5) A route sales driver for a potato chip company in Corpus Christi. This is full time employment which paid $350.00 to $400.00 per week in 1994 and guaranteed $400.00 per week in 1998. There is also the ability to make an additional amount from commissions. (Tr. 288-289; EX.16, p. 8).

6) A forklift operator at a lumber company in Corpus Christi. The position paid $7.50 per hour in 1998. According to the *Occupational Outlook Handbook*, the 1994 median wage range for material moving equipment operators in 1994 was $459.00 per week.(Tr. 290-291; EX.16, p. 8).

7) A forklift operator position available through an employment agency. In 1994 it paid $5.00 to $7.00 per hour while in 1998 it paid $6.00 to $8.00 per hour.(EX.16, p. 8).

8) A forklift operator at a storage warehouse which paid $5.00 per hour in 1994. In 1998 it paid $6.00 to $7.00 per hour. (Tr. 291-292; EX.16, p. 8).

Ms. Favaloro thought that the restrictions in Dr. Gutzman's OWCP-5 were unclear and thus not binding. She also thought Dr. Echeverry, who is in agreement with Dr. Gutzman's limitations, was unclear. However, she believed Dr. Echeverry was agreeing with the proposition that Claimant could work part time. (Tr. 302-303, 320).

At the time of the trial, Ms. Favaloro could confirm positions were still available at all but the security company. (Tr. 295). She did state that in some cases part-time employment was limited to certain time periods. The Dispatcher position with Safeguard was only available on the weekends. (Tr. 307-308).

Vocational Report of William J. Kramberg

Mr. Kramberg is a vocational rehabilitation specialist in Houston, Texas. In his report responding to the evidence presented by Ms. Favaloro, Mr. Kramberg points out several problems with the employment positions presented. According to Mr. Kramberg, there are no dispatcher positions with Safeguard as there are no four hour positions available and the applicant must be able to type 30-40 words a minute. (CX.16, pp. 4-5).

The delivery/trainee assistant position for Toothworks is part-time but does not fit into the 2 hour requirements set by Dr. Gutzman. The driving portion of the job was considered by Dr. Barrash to pose an unreasonable risk of paralysis for someone with a neck fusion. Mr. Kramberg also found the lab assistant position was only available if there were a special stipend provided to pay the applicant's wages during the training period. (CX.16, p. 5).

Mr. Kramberg feels Claimant would be unlikely to be hired as a telemarketer for the Corpus Christi Times. The job is well within the physical restrictions of light to sedentary labor; however, the shifts are 4 hours long. There is a general need to be computer literate and type roughly 20 to 25 words per minute which he does not feel Claimant can do. Mr. Kramberg also doubts Claimant's communication skills. (CX.16, pp. 5-6).

The position as a security guard for Guardco was not suitable as it required a state licensure and has part-time shifts in excess of Dr. Gutzman's two hours. (CX.16, p. 6).

The Wal Mart photo lab position was objected to by Mr. Kramberg as it exceeded the physical requirements of Drs. Echeverry and Gutzman. According to the manager the job was slightly above light duty in scope. (CX.16, p. 6).

Mr. Kramberg found the "Appropriate Jobs in 1994" did not meet Claimant's current physical abilities. These objections were based on Claimant's current physical abilities, not his status in 1994. As a result there is no evidence from Mr. Kramberg concerning Claimant's ability to perform these jobs in 1994. (CX.16, pp. 6-8).

The report of Mr. Kramberg was countered by Ms. Favaloro's August 21, 1998 Labor Market Survey Report. Ms. Favaloro continues to believe Claimant is capable of performing any of the five part-time jobs presented in her initial report. The dispatcher and telemarketer positions have no prerequisite of computer literacy or a set typing speed. Both are taught to new employees in on-the-job training courses. (CX.20, pp. 3-4).

The driver/lab assistant trainee at Toothworks is well within Claimant's restrictions according to the manager of the facility. The driver position is the same as the trainee position. When not driving the employee is trained as a lab assistant. A stipend is not required though the employer would be happy to receive one. If such a stipend were required it could be secured through the U.S. Department of Labor. (CX.20, p. 3).

The security guard position does require a licensure; however, it is not a prerequisite for being considered for the job. Once hired the applicant watches a video and takes a multiple choice test to get the licensure. At that point the $75 is due and may be paid out of an employee's new earnings. Denise at Guardco reaffirmed there are part time positions consisting of 4 hour shifts. (CX.20, p. 4).

The Wal Mart photo center worker would require lifting up to, and not exceeding, 20 pounds. Wal Mart last hired an individual for this position in July of 1998. This is a light duty position and has been approved by Dr. Barrash. (CX.20, p. 4).

IV. DISCUSSION

In arriving at a decision in this matter, it is well-settled the fact-finder is entitled to determine the credibility of the witnesses, to weight the evidence, and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiners. Todd Shipyards v. Donovan, 300 F.2d 741 (5th Cir. 1962); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 666 F.2d 898, 900 (5th Cir. 1981); Banks v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 928 (1968). It has been consistently held the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967).

However, the United States Supreme Court has determined the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies the proponent of a rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 114 S.Ct 2251 (1994), aff'g, 9990 F.2d 730 (3rd Cir. 1993)

CAUSATION

Section 20(a) of the Act provides Claimant with a presumption that his disabling condition is causally related to his employment if he shows he suffered a harm and employment conditions existed which could have caused, aggravated or accelerated the condition. Gencarelle v. General Dynamics Corp., 22 BRBS 170 (1989), aff'd, 892 F.2d 173, 23 BRBS 13 (CRT)(2d Cir. 1989). Once Claimant proves these elements, the Claimant has established a prima facie case and is entitled to a presumption that the injury arose out of the employment. Keliata v. Triple Machine Shop, 13 BRBS 326(1981); Adams v. General Dynamics Corp., 17 BRBS 258 (1985). With the establishment of a prime facie case, the burden shifts to Employer to rebut the presumption with substantial countervailing evidence. James v. Pate Stevedoring Co., 22 BRBS 271 (1989). If the presumption is rebutted, the administrative law judge must weight all the evidence and render a decision supported by substantial evidence. Del Vecchio v. Bowers, 296 U.S. 280 (1935).

An injury occurs when something unexpectedly goes wrong within the human frame. Wheatley v. Adler, 407 F.2d 307 (D.C. Cir. 1968). An external, unforeseen incident is not necessary; experiencing back pain or chest pain at work can be sufficient. Darnell v. Bell Helicopter Int'l Inc., 16 BRBS 98 (1984) If an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant condition is compensable; the relative contributions of the work-related injury and prior condition are not weighed in determining Claimant's entitlement ("aggravation rule"). Wheatley, at 307.

In this instance, the parties are in agreement that Claimant sustained injuries as result of a work-related accident on March 18, 1988.(JE-1; EX.1) During that accident, Claimant was struck on the leg by falling drill pipes while attempting to save the life of a fellow employee. After being struck by the pipes, Claimant was thrown into the wall of the ship's hold, injuring his left shoulder. (CX.1, p. 39; EX.11, p. 14) .

The Right Knee Injury

The injury to Claimant's right knee was the result of his leg being struck by drilling pipes on March 18, 1988. Claimant suffered a non-work related injury to his right knee on December 22, 1987; however, it had fully healed by the time of the March 18, 1988 accident. (EX.11, p. 13-14). The new injury was found as a result of Dr. Perez's MRI on Claimant's right knee.(EX.11, p. 28). The March 18, 1988 injury to the right knee was a new injury which Claimant has shown could have resulted from his work environment. I find Claimant has established a prima facie case that the knee injury is a work related injury and is entitled to the Section 20(a) presumption.

There is insufficient evidence presented to sever the causal relationship established by Claimant. Employer presented no credible evidence that Claimant's knee injury was not the result of a work related accident. Having failed to meet his rebuttal burden, Employer is unable to negate the Section 20(a) presumption in favor of Claimant.

The C5-6 and C6-7 Injuries

The record contains testimony and evidence that the damage caused to Claimant's cervical spine, C5-6 and C6-7, are the result of the March 1988 accident. According to Claimant's medical records and Dr. Echeverry's deposition, Claimant suffered a herniation of the C5-6 and C-6-7 discs as a result of his March 1988 accident. (CX.1, pp. 12-13). This is substantiated by the MRI tests performed October 6, 1988, EMG tests performed February 8, 1989, and the myelogram and CAT scans on May 1, 1990. (EX.11, pp. 16-18, 27, 35). All of these tests confirmed the herniations Dr. Echeverry found during the anterior cervical diskecotmy and fusion he performed on November 10, 1992. (EX.11, pp. 55-56).

The record contains sufficient evidence to support Claimant's contention that he sustained an injury to his neck. The manner in which he struck the wall was sufficient to trigger the type of injury he sustained. (CX.1, pp. 39-41). Because Claimant has shown he sustained an injury which could have resulted from his work environment, I find the Claimant is entitled to the Section 20(a) presumption with regards to his original cervical spine injury. The burden now shifts to Employer to present substantial countervailing evidence which will sever the causal relationship presented by Claimant. Employer has failed to present such evidence so the Section 20(a) presumption stands.

The C4-5 Injury

The record and exhibits in this case prove a new cervical spine injury occurred in April of 1995. The deposition of Dr. Echeverry and the testimony of Claimant establish Claimant experienced a sharp pain while applauding at his son's basketball game. (EX.11, p. 68). Dr. Echeverry performed a MRI, myelogram and CT scan which all confirmed the presence of an

injury to the C4-5 area. (EX.11, pp. 68, 72). As this injury did not occur in a work related environment, it does not represent a new work-related injury.

Section 2(2) of the LHWCA defines "injury" in such a manner as to include situations where Claimant suffers an injury at work followed by a subsequent injury or aggravation. If the second injury is the natural, direct, and unavoidable consequence or result of the initial injury then Employer is liable for the entire disability that results. Bludworth Shipyard v. Lira, 700 F.2d 1046(5th Cir.1983); Mijangos v. Avondale Shipyards, 19 BRBS 15 (1996); Hicks v. Pacific Marine & Supply Co., 14 BRBS 549 (1981). If the subsequent injury is the result of an intervening cause, then Employer is relieved of liability for the portion of Claimant's disability attributed to the subsequent injury. Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140, 144 (1991).

In Dr. Echeverry's opinion it is medically possible that the injury to C4-5 was an aggravation or subsequent injury to the damage sustained by the neck in 1988. His prognosis is the C4-5 disc was forced to compensate for the reduction in movement caused by the fusion of C5-6 and C6-7. The increased strain was such that when Claimant jumped up at the game the C4-5 disc was unable to compensate. The result was a subsequent injury to the work-related injury. (CX.1, p. 26-27). Because Claimant has shown this could be a subsequent injury which is the natural, direct, and unavoidable consequence of a work-related injury, I find Claimant is entitled to the Section 20(a) presumption.

Employer has presented evidence and testimony which tends to rebut the causation scenario presented by Claimant. Dr. Barrash's testimony at the hearing presented a scenario whereby the injury resulted from the act of jumping up, not of an over-compensation by the disc above the fusion of C5-6. He notes that Dr. Echeverry is correct in that problems can occur in spinal discs on either side of a fusion; however, it is Dr. Barrash's opinion Claimant's C4-5 problems are an independent acute discongenic problem. (Tr. 205-207). I find Dr. Barrash's testimony provides specific and substantial evidence which rebuts the position taken by Claimant's physician. Therefore the Employer successfully carried his burden of proof in refuting the Section 20(a) presumption of causation.

The presumption having been rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. Del Vecchio v. Bowers, 296 U.S. 280 (1935); Volpe v. Northeast Marine Terminals, 671 F.2d 697 (2nd Cir. 1982).

In Dr. Echeverry's opinion, it is medically possible the injury to C4-5 is an aggravation or subsequent injury to the damage sustained by the neck in 1988. (CX.1, pp. 26-27). The problem with Claimant's C4-5 disc was first clinically diagnosed on a July 5, 1995 MRI of Claimant's cervical spine. According to Dr. Echeverry the MRI showed postop changes of the fusion at C5-6 and C6-7 combined with severe neural canal stenosis at C4-5. The MRI also showed a midline and left side cervical disk herniation at C4-5. (EX.11, p. 72).

On August 11, 1995, Dr. Echeverry performed a cervical myelogram and a CT scan. The results show a very large C4-5 anterior extra dural defect with calcifications centrally and to the left side. Indeterminate between partially calcified disc and very large cartilageous cap over spurring though the latter was unlikely. (EX.11, pp. 73-75). These findings were confirmed by Dr. Gutzman's study of the MRI films in 1998. (EX.11, pp. 87-88).

Concerning the effects of the surgery at C5-6 and C6-7 on the adjoining regions of the cervical spine Dr. Echeverry stated "When you do a fusion, you're eliminating one of the levels where you have movement. He had two fusions, so we eliminated two levels where he had movement. The vertebrae above and below had to compensate for the movement, and then they developed problems in those levels." Dr. Echeverry went on to state that the problems Claimant is experiencing at C4-5 are a consequence of the fact that he required a fusion from his original injuries. (CX. 1, pp. 26-27).

The testimony and medical evidence of Dr. Barrash is presented on behalf of Employer's contention that the subsequent injury in April of 1995 was not causally related to the fusion resulting from the March 1988 accident. (Tr. 183). His findings are in agreement as to the physical evidence found by Dr. Echeverry; however, he finds evidence of a different causal scenario. In his June 9, 1998 report, Dr. Barrash agrees that the injury to Claimant's C5-C7 vertebrae is the result of the March 18, 1988 accident. However, Dr. Barrash notes the C4-5 injury has not appeared on any of the imaging scans performed prior to April of 1995. Thus the injury is a subsequent injury as opposed to an aggravation or latent aspect of the original injury. (EX.11, p. 89).

In the June 30, 1998 report, Dr. Barrash provides proof of the intervening factor which he believes disrupts Claimant's causal chain. Dr. Barrash did find Claimant has an annular bulge and some slight degeneration of the L4/5 disc. However, this was insufficient to constitute a herniation of the disc. (Tr. 173). He also found stenosis of the C4-5 disc from the injury combined with spondylosis which occurred with time as a wear-and-tear process. Furthermore, he found evidence of acquired spinal stenosis at C5-6 and C6-7 from osteoarthritis changes. (EX.11, pp .91). Dr. Barrash testified that Claimant's current problems are not related to his previous cervical injuries of March, 1988 or to the surgery performed by Dr. Echeverry to fuse the C5-6 and C6-7 levels. (Tr. 183-184).

Generally greater deference is given to the opinion of Claimant's treating physician in recognition of his greater understanding of the intimacies of a given Claimant's case. As the treating physician, Dr. Echeverry is certainly more familiar with Claimant's treatment and medical condition. Dr. Echeverry has been performing cervical and lumbar surgeries for 27 years. However, in this case Dr. Barrash's certification by the American Board of Neurological Surgery and his record of treating longshoremen both in private practice and as an independent medical examiner for the U.S. Department of Labor must also be considered. Thus the determination comes down to a weighing of the evidence presented by the two doctors. In this respect, I find the testimony of Dr. Echeverry more compelling. Although Dr. Barrash presents a definite opinion that Claimant's current problems are unrelated to the previous injuries and surgery, he fails to explain how such a routine movement as jumping could have caused Claimant's current injury. Dr. Barrash never fully addresses the possibility of the disc being effected to some degree by its need to compensate the lack of motion caused by the fusion of C5-6 and C6-7. As stated by Dr. Echeverry, you would not expect a person with a healthy spine to hurt themselves by jumping up to cheer. (CX1, p. 95). I find Dr. Echeverry's testimony that the problems Claimant is experiencing at C4-5 are caused by the fusion from his original injuries more compelling. Accordingly, I find the injury to the C4-5 level is the natural, direct, and unavoidable consequence or result of the initial injury and surgery.

The Lumbar Spine Injury

The medical evidence and the record show Claimant has suffered from lumbar spine problems as a result of the March 18, 1988 accident. Dr. Seger, in 1989, took five x-rays of Claimant's lumbar spine after finding there was tenderness and a reduction of the normal range of movement. There was no evidence of fractures, dislocations, or joint space narrowing. As a result it was Dr Seger's opinion Claimant was suffering from a chronic lumbar strain resulting in a permanent partial impairment to the lumbar area of 5%. (EX.11, pp. 31-32).

On July 10, 1990 Claimant was examined by Dr. Edwards in San Antonio in order to get an independent medical opinion on the lumbar spine injury. Dr. Edwards performed an MRI of Claimant's lumbar area and determined there was a mild protrusion of the L4-5 and L5-S1 interspace material with spur formation which were compounded by spinal stenosis. According to Dr. Edwards, lumbar surgery might be required in the future. (EX.11, pp. 41-44). This was supported by Dr. Newth's 1994 MRI which showed degenerative disc bulging at L4-5 and L5-S1. (EX.11, pp. 62-63).

The findings of Dr. Seger are also supported by the testimony of Dr. Echeverry and the report of Dr. Gutzman. Dr. Echeverry testified that though he had not treated Claimant's lower back, he knew irregularities had been found on MRIs. In his experience treating lower back problems over the last twenty years, the irregularities on the MRIs could cause the Claimant to have physical restrictions. (CX.1, pp.19-20). Dr. Gutzman was more specific, stating in his report Claimant had spinal stenosis with herniated disk at L4-5 and annular building at L5-S1. This resulted in a midline paraspinal musculature of the lumbar spine. (EX.11, pp. 87-88).

This record contains sufficient evidence to support Claimant's contention he sustained an injury to his lumbar spine. The manner in which he struck the wall was sufficient to trigger the type of injury which he sustained. (CX.1, pp. 39-41). Because Claimant has shown he sustained an injury which could have resulted from his work environment, I find the Claimant is entitled to the Section 20(a) presumption with regards to his lumbar spine. The burden of evidence now shifts to Employer to present substantial countervailing evidence which will sever the causal relationship presented by Claimant.

On December 19, 1988 Dr. Martin, performing a second examination for Carrier, found Claimant was suffering from a lumbar strain. (EX.11, pp. 23-25). Dr. Martin reexamined Claimant on May 8, 1990. At that point he could find no problems with Claimant's lumbar spine on a myelogram which was performed on March 27, 1990.

Dr. Barrash felt that there was nothing in Claimant's lumbar region which would cause a restriction in his ability to work. (Tr. 178). Dr. Barrash reviewed the MRIs of Claimant's lumbar region and agrees there is some disc degeneration. He does not feel it is a herniation. He feels the bulging is a result of the loss of water content in the discs as Claimant ages. He therefore blames the damage on aging and not on either the general employment nor the March 18, 1988 accident. (Tr. 173).

Employer must produce substantial evidence to rebut the statutory presumption that "the claim comes within the provisions" of the Act. See 33 U.S.C. §920(a). That evidence must be "specific and comprehensive enough to sever the potential connection between the disability and

the work environment." Parsons Corp. of California v. Director, OWCP, 619 F.2d 38 (9th Cir. 1980, aff'g, 6 BRBS 607 (1977); Butler v. District Parking Management Co., 368 F.2d 682 (D.C. Cir. 1966); Ranks v. Bath Iron Works Corp., 22 BRBS 301, 305 (1989). I find that Employer has not presented evidence which was either specific or comprehensive enough to rebut the granting of the Section 20(a) presumptions. Moreover, weighing all the evidence, I find the evidence supports a finding that Claimant's lumbar injuries were caused by the accident of March 18, 1988.

NATURE AND EXTENT

Having established work-related injuries, the burden rests with the Claimant to prove the nature and extent of his disability, if any, from those injuries. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1985). A Claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement(MMI). James v. Pate Stevedoring Co., 22 BRBS 271, 2741(1989); Trask, at 60. Any disability before reaching MMI would thus be temporary in nature. The date of MMI is a question of fact based upon the medical evidence of record. Ballestros v. Willamette Western Corp., 20 BRBS 184 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979). An employee reaches MMI when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395 (1981).

I disagree with the parties's stipulation that MMI for all of Claimant's injuries was reached on December 1, 1993.(JE-1) I find the record and exhibits contains clear evidence that Dr. Perez set MMI for Claimant's scheduled knee injury as of March 7, 1989. (CX.11, p. 29).

I agree with the parties' stipulation, regarding Claimant's unscheduled injuries, that MMI was reached as of December 1, 1993.(JE-1; Tr. 237). Dr. Echeverry and Dr. Barrash believe MMI has been reached although there is a need for future surgery to be performed upon Claimant's cervical spine at C4-5. (Tr. 183). The possibility of future surgery does not preclude a finding of MMI where the surgery is either unlikely to improve Claimant's condition or his ability to do any work after the surgery is uncertain. Phillips v. Marine Concrete Structures, 21 BRBS 233, 235 (1988); White v. Exxon Co., 9 BRBS 138,142 (1978), aff'd mem., 617 F.2d 292 (5th Cir. 1980).

Based on the testimony of Dr. Echeverry and Dr. Barrash the chances Claimant would have a significant improvement in his ability to return to gainful employment is small. (CX.1, pp. 90-91; Tr. 187-188). Both physicians are also in agreement that unless Claimant has the surgery on C4-5, he has reached MMI as of December 1, 1993. (Tr. 189, 238). This must be considered in light of the ample evidence and testimony by Claimant and Dr. Echeverry which places in doubt the certainty that the surgery will ever be performed.

Claimant has suffered both "schedule" (right knee) and "non-schedule" (spine) injuries. §908(c)(2) &(19); §908(c)(21). If a claimant suffers a "schedule" injury and a "non-schedule" injury arising from and caused by a single accident, the claimant may be able to recover for both concurrently. Green v. I.T.O. Corporation of Baltimore, 32 BRBS 67, 70 (1998); Frye v. Potomac Electric Co., 21 BRBS 194, 198 (1988) Claimant's scheduled injury reached MMI on March 7, 1989, while his unscheduled injury reached MMI on December 1, 1993. During this period it was the combined affects of the disabling back injuries and the partially disabling knee injury that caused the loss in wage-earning capacity. Therefore there is no issue of concurrent recovery in this case. I find that Employer owes compensation for the 30% impairment to Claimant's lower

extremity commencing from MMI on March 7, 1989, and continuing for 86 ½ weeks (288 x 30%).[3] Thereafter, Claimant is entitled to temporary total disability until MMI was reached on December 1, 1993. I find Claimant is entitled to permanent partial disability following MMI for the unscheduled injuries as of December 1, 1993, as discussed below.

The question of extent of disability is an economic as well as medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir. 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940). Disability under the LHWCA means an incapacity, as a result of injury, to earn wages which the employee was receiving at the time of the injury at the same or any other employment. 33 U.S.C. §902(10). In order for Claimant to receive a disability award, he must have an economic loss coupled with a physical or psychological impairment. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Economic disability includes both current economic harm and the potential economic harm resulting from the potential result of a present injury on market opportunities in the future. Metropolitan Stevedore Co. v. Rambo (Rambo II), 117 S.Ct. 1953, 1955 (1997). A Claimant will be found to have either no loss of wage-earning capacity, no present loss but a reasonable expectation of future loss (de minimis), a total loss, or a partial loss.

A Claimant who shows he is unable to return to his former employment has established a prima facie case for total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. P & M Crane v. Hayes, 930 F.2d 424, 430 (5th Cir. 1991); New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Furthermore, a Claimant who establishes an inability to return to his usual employment is entitled to an award of total compensation until the date on which Employer demonstrates the availability of suitable alternative employment. Rinaldi v. General Dynamics Corps., 25 BRBS 128 (1991).

In the instant case there is a need to decide the extent of Claimant's injuries for two separate periods of time. The first period consisting of the time from December 1, 1993 (MMI) to April 5, 1995, when Claimant reported his second cervical spine injury to Dr. Echeverry. The second period of disability is from April 5, 1995 to the present time. Employer has made no argument that Claimant was able to return to his former employment as a longshoreman during either period. I find the medical evidence discussed under "Suitable Alternative Employment" clearly establishes this fact. The limitations as to climbing, lifting, and use of vehicles would prevent Claimant from returning to his normal duties as a longshoreman. Claimant's original job included general laboring, operating a forklift, operating a cargo tow, and working in cranes. All of these are now outside of Claimant's physical limitations as set out by Dr. Martin, the doctor retained by Carrier. (CX.2, p. 242). The only position Claimant could perform at his previous employment is that of flagman which is not frequently available. Thus Claimant has established a prima facie case for total disability.

SUITABLE ALTERNATIVE EMPLOYMENT

The claimant does not have the burden of showing there is no suitable alternative employment available. Rather it is the duty of the employer to prove that suitable alternative employment exists. Shell v. Teledyne Movable Offshore, 14 BRBS 585 (1981); Smith v. Terminal Stevedores, 111 BRBS 635 (1979). The employer must prove the availability of actual identifiable,

[3]Dr. Seger assigned Claimant a 30% impairment to the right knee. This was not disputed.

not theoretical, employment opportunities within the local community. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981), rev'g, 5 BRBS 418 (1977); Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 1330, 12 BRBS 660, 662 (9th Cir. 1980. The specific job opportunities must be of such a nature that the injured employee could reasonably perform them given his age, education, work experience, and physical restrictions. Edwards v. Director, OWCP, 999 F.2d 1374 (9th Cir 1993), cert denied, 114 S.Ct. 1539 (1994); Turner, 661 F.2d at 1041-1042. The employer need not place the claimant in suitable alternative employment. Trans-State Dredging v. Benefits Review Bd. (Tarner), 731 F.2d 199, 201, 16 BRBS 74, 75 (CRT)(4th Cir. 1984), rev'g, 13 BRBS 53 (1980); Turner, 661 F.2d at 1043, 14 BRBS at 165.

The employer must establish the claimant's earning capacity by at least establishing the pay scale for alternate employment. Moore v. Newport News Shipbuilding & Dry Dock Co. , 7 BRBS 1024 (1978); Dupuis v. Teledyne Sewart Seacraft, 5 BRBS 628 (1977). The employer must affirmatively demonstrate the availability of the employment, not merely allege that such work exists. Roger's Terminal & Shipping Corp. v. Director, OWCP, 784 F.2d 687, 18 BRBS 79 (CRT)(5th Cir.1986), cert. denied, 479 U.S. 826 (1986)

Claimant's physical status from December 1, 1993 to April 5, 1995 is based on the reports of Drs. Martin, Seger, and Echeverry. Dr. Martin filed a OWCP-5 on May 27, 1990 stating Claimant could continuously sit or walk for eight hours. Claimant could bend, squat, kneel, twist, and stand for eight hours as long as it was intermittent. Climbing was restricted completely and lifting was limited to between ten and twenty pounds. Though Claimant was not prohibited from using foot controls, driving was prohibited. (EX.11, pp. 36-37).

Dr. Seger had assigned a 10% permanent partial impairment to Claimant's neck. (EX.11, p. 35). He also found a 5% permanent partial impairment of Claimant's lumbar spine and 30% permanent partial impairment of his right knee. (EX.11, pp. 31-32).

According to Dr. Echeverry's September 8, 1994 OWCP-5, Claimant's neck was not assigned any limitations that would prevent his return to his previous employment. (EX.11, p. 65).

Claimant's physical status from April 5, 1995 to the present is based on the reports and testimony of Dr. Echeverry and Dr. Barrash. The opinion of Dr. Gutzman, while considered, was given less weight. His findings are significantly more restrictive than those of either Dr. Echeverry or Dr. Barrash who have been treating Claimant, and longshoremen generally, for longer than Dr. Gutzman.

If no surgery was performed on C4/5 then Dr. Echeverry would feel uncomfortable allowing Claimant to perform any physical activities. This does not include sedentary employments as they are less likely to present a risk of damage to the spinal cord that is under pressure at C4/5. This means no manual labor or exposure to trauma. For this reason Dr. Echeverry feels a security guard position is out of the question due to the possibility of injury during a confrontation. However, if the work was limited to standing or sitting while watching a monitor it would be sedentary and acceptable. He could also lift items up to ten pounds. Claimant would be at risk reaching above his shoulder level; however, bending, kneeling, driving sitting short periods, and walking would not present a risk to Claimant's neck. (CX.1, pp. 85-89).

Climbing steps and ladders would not present a major risk to the neck as long as they were done in a safe manner. Dr. Echeverry feels an office type job would be acceptable as it does not require large neck movements. (CX.1, pp. 89-90).

When considering the lower back and neck injuries together Dr. Echeverry would further restrict Claimant from activities requiring the use of his lower back, lower extremities, bending, climbing and kneeling. Both of the C4-5 and lumbar spinal injuries are in need of treatment; however, Claimant has not decided to undergo surgery at this time. (CX.1, pp. 96-98).

Without the surgery Dr. Barrash feels Claimant is facing some restrictions on his ability to work. He feels a semi-sedentary employment includes office work or being a security guard as long as the lifting is less than 20 pounds. (Tr.189-191). He also feels kneeling should be kept to less than 12 times a day and no climbing of ladders due to the pressure it puts on the neck.(Tr. 194).

Dr. Barrash strongly disagrees with the report by Dr. Gutzman. He feels there is no reason for Dr. Gutzman's opinion that Claimant has a complete inability to perform any type of work. (Tr.210-211, 230). Dr. Barrash feels Claimant would not do well in jobs which require him to tilt his head and neck backwards to a significant degree. (Tr. 233, 236-237). He also feels sitting for eight hours or lifting more than 25 pounds is not a good idea. (Tr.233-237).

Nancy Favaloro testified that, at the request of Employer, she had performed vocational labor market surveys of suitable alternative employment positions available in both 1994 and 1998. Ms. Favaloro interviewed the claimant and administered the several tests constituting the Woodcook-Johnson Revised Tests of Achievement. (Tr. 270). The results of the Woodcook-Johnson test and a review of Claimant's employment file suggest Claimant would be well-suited for an entry-level job. According to Ms. Favaloro he possesses an average aptitude in tasks dealing with general intelligence. He knows how to follow instructions; has demonstrated an ability to handle responsibility; can operate machinery; and work to specifications. (Tr. 274; EX.16, p. 4).

In both instances there are several jobs within the medical and physical restrictions which have been placed upon Claimant. The medical restrictions imposed by Dr. Martin and Dr. Seger would prohibit working as a route sales driver or a forklift operator. (EX.16, p. 8). It would not prevent Claimant from performing the rest of the jobs in Ms Favaloro's 1994 survey.

I find Employer has shown there are jobs available within Claimant's physical and educational abilities, age, experience and geographic area which he could secure and perform if he diligently tried. I give more weight to the testimony of Ms. Favaloro than to Mr. Kramberg as Mr. Kramberg applied Claimant's 1998 limitations to his treatment of the 1994 survey. The record and exhibits present no evidence that Claimant ever attempted to secure employment following the injury in 1989. New Orleans(Gulfwide) Stevedores v. Turner, 661(F.2d 1031, 1043 (5th Cir. 1981), rev'g, 5 BRBS 418 (1977).

I find Claimant has failed in his burden of proof needed to rebut Employer's suitable alternative employment. Claimant's wage earning ability from December 1, 1993 to April 5, 1995

is set at $4.50 per hour based on Claimant's ability under his medical restrictions, to perform as a light assembly worker or custodian. His wage earning capacity during this period is $180.00 ($4.50/40 hours).

Ms. Favaloro and Mr. Kramberg have very different findings as to Claimant's ability to work in 1998. The major issue of conflict being the number of hours Claimant can work in a single period. This stems from a disagreement between Dr. Barrash and Dr. Gutzman. It is the opinion of Dr. Barrash that Claimant is capable of performing a part-time job(4 hours/day). Dr. Gutzman feels Claimant can only work for roughly 2 hours per day. Dr. Echeverry, Claimant's treating physician, refused to set a number of hours per day. He feels patients must find out the number of hours they can work through trial and error. As Claimant has made no attempt to return to the work force since 1989 there is no way for his testimony to aid the trier of fact in determining Claimant's actual abilities when placed in a work environment.

Dr. Barrash and Dr. Echeverry do agree on many of Claimant's physical restrictions. Dr. Barrash feels Claimant could work as a dispatcher, telemarketer, security guard, or as a worker in a photo lab. (Tr. 228-232). Dr. Echeverry feels a security guard position is out of the question due to the possibility of injury during a confrontation. However, if the work were limited to essentially just standing or sitting while watching a monitor, the work would be sedentary and acceptable.(CX.1, p. 85-89) Both doctors also feel Claimant can operate a vehicle. (CX.1, pp. 103, 106; Tr. 229).

Dr. Barrash feels a semi-sedentary employment includes office work and being a security guard as long as the lifting is less than 20 pounds. (Tr.189-191). He feels kneeling should be kept to less than 12 times a day and Claimant should not climb ladders because of the pressure it puts on his neck. (Tr. 194).

Dr. Gutzman is much more conservative in his description of Claimant's limitations. According to his OWCP-5, Claimant can not squat, climb, twist, or kneel at all. Claimant can lift and bend for an hour intermittently and sit intermittently for 2 hours. He can intermittently walk for 4 hours or stand for 2 hours and should not lift object heavier than 10 pounds. Dr. Gutzman concludes Claimant can perform 1 to 2 hours light duty work; however, light duty requires a much more physically capable body. (CX.1, DepX.4) Light duty is classified as lifting up to 20 pounds. (Tr. 190).

I find the opinions of Dr. Echeverry and Dr. Barrash present an accurate analysis of Claimant's restrictions. Dr. Gutzman's opinion is therefore given less credit where it differs from the opinions of the other two physicians. I find the dispatcher, security guard, and telemarketer jobs are clearly within Claimant's medical restrictions and classify as suitable alternative employment for the April 5, 1995 to current period. I find Claimant's wage earning capacity from April 5, 1995 to the current period is $5.50 per hour. This is the starting salary for the dispatcher, security guard, and photo lab worker. Claimant's post injury average weekly wage for these part-time positions is $110.($5.50 x 20 hour/week).

SECTION 14(E) PENALTIES

Claimant asserts Section 14(e) penalties should be assessed against Employer for late payment of voluntary compensation payments to Claimant.

Under Section 14(e) an employer is liable for an additional 10% of the amount of workers' compensation due where the employer does not pay compensation within 28 days of learning of the injury, or if employer fails to timely file a Notice of Controversion within 28 days. 33 U.S.C. §914. Although Claimant asserts this to be an issue, Claimant does not identify any instance where Employer has failed to meet the requirements of Section 14(e). I find in this case Employer began paying compensation immediately so there are no penalties due under Section 14(e). (EX.17, p. 1).

SECTION 14(J) CREDIT

Employer may have right to receive a credit towards future permanent partial disability payments, based on an overpayment of voluntary total temporary disability. Nicholls v. Sun Shipbuilding & Dry Dock Co., 8 BRBS 710, 712 (1978). Section 14(j) does not establish a right of repayment or recoupment for an alleged overpayment of compensation. Ceres Gulf v. Cooper, 957 F.2d 1199, 1208 (5th Cir. 1992). Employers credit is based on the total amount paid not the number of weeks paid. Hubert v. Bath Iron Works Corp., 11 BRBS 143, 147 (1979), overruled in part by Potomac Elec. Power Co. v. Director, OWCP, 449 U.S. 268 (1980).

ORDER

It is hereby ORDERED, JUDGED AND DECREED that:

1. Employer shall pay Claimant compensation for temporary total disability from March 18, 1988 through March 7, 1989, based on an average weekly wage of $364.39.

2. Employer shall pay Claimant compensation for his scheduled knee injury of 30% pursuant to Section 908(c)(2) &(19) of the Act commencing on March 7, 1989, and continuing for 86 ½ weeks based on an average weekly wage of $364.39.

3. Following the payment of compensation for Claimant's scheduled knee injury, Employer shall pay Claimant compensation for temporary total disability through December 1, 1993, based on an average weekly wage of $364.39.

4. Employer shall pay Claimant permanent partial disability compensation from December 1, 1993 until April 5, 1995 pursuant to Section 908(c)(21) of the Act based on an average weekly wage of $364.39 and a residual wage-earning capacity of $180.00 in accordance with §8(c)(21) of the Act.

5. From April 5, 1995, and continuing into the future, Employer shall pay Claimant permanent partial disability compensation pursuant to Section 908(c)(21) of the Act based on an average weekly wage of $364.39 and a residual wage-earning capacity of $110.00 in accordance with §8(c)(21) of the Act.

6. Employer shall receive a credit for excess compensation benefits paid to Claimant.

7. Pursuant to Section 7 of the Act, Employer shall pay for all of Claimant's reasonable and necessary medical expenses arising out of Claimant's March 18, 1988 accident and injuries and Claimant's April 5, 1995 accident and injuries.

8. Counsel for Claimant, within 20 days of receipt of this Order, shall submit a fully-supported fee application, a copy of which must be sent to all opposing counsel who shall then have ten days to respond with objections thereto.

9. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

ORDERED this 27th day of November, 1998, at Metairie, Louisiana

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LARRY W. PRICE
Administrative Law Judge